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Nebraska's $160 Million Liability?—*Entergy Arkansas, Inc. v. Nebraska*, 241 F.3d 979 (8th Cir. 2001)

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Note*

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I. INTRODUCTION

America generates millions of cubic feet of low-level radioactive waste each year.[1] The radioactive waste can be extremely dangerous to humans and must be isolated for long periods of time, often hundreds of years.[2] In the late 1970s there were only three radioactive waste disposal facilities in operation in the United States,[3] all of which were nearing capacity. Recognizing the need to address this looming shortage of waste disposal facilities, in 1980 Congress enacted the Low-Level Radioactive Waste Policy Act ("Act").[4] In the Act, Congress declared a federal policy of holding each state "responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders," and found that such waste could be disposed of "most safely and efficiently . . . on a regional basis."[5] Consequently, Congress authorized states to enter into regional compacts that, once ratified by Congress, would have the authority to restrict the use of their disposal facilities to waste generated by the regional compact-member states.[6]

In 1983, Nebraska formed an Interstate Compact ("Compact") with Kansas, Arkansas, Oklahoma and Louisiana (collectively, the "party states") to build a regional disposal site for the low-level radioactive waste they generated.[7] Authority for the Compact derived from the Act. Each of the five states enacted the Compact as legislation[8] and in 1986 Congress approved the Compact.[9] The Compact provided the framework for licensing a facility for the disposal of low-level radioactive waste generated in the five states.[10] Additionally, the Compact

1. *See* Dan M. Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 HARV. ENVTL. L. REV. 437, 439-40 (1987).
2. *See id.*
3. These facilities were located in Nevada, Washington, and South Carolina. *See id.* at 441.
4. *See* Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347, § 4(a)(1) (1980).
5. *Id.*
6. By passing the Act, Congress essentially allowed states to discriminate in their acceptance of low-level radioactive waste. Without Congressional approval, such discrimination would likely violate the Privileges and Immunities Clause of Article IV of the Constitution. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617 (1978).
7. *See* Leslie Reed, *Utilities Denied Role in Lawsuit*, OMAHA WORLD-HERALD, Aug. 30, 2001, at 1, *available at* LEXIS, News Library, Omaha World Herald File.
8. *See, e.g.*, NEB. REV. STAT. § 71-3521 (Reissue 1996), *repealed by* NEB. REV. STAT. §§ 71-3521 to 71-3522 (effective Aug. 28, 1999) (Cum. Sup. 2000).
9. *See* Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, tit. II, § 222, 99 Stat. 1859, 1863-71 (1986) (reprinting the Compact which will hereinafter be cited by article).
10. *See id.*

established the Central Interstate Low-Level Radioactive Waste Commission ("Commission") as the governing body to carry out the Compact's purposes.[11] Each party state was represented by one Commission member who was entitled to one vote.[12]

In December 1987, the Commission, in a four to one vote, chose Nebraska as the first member state to host a low-level radioactive waste disposal facility.[13] The Compact required the Commission to follow the host state's procedures for application of a license before construction of the waste disposal facility could begin.[14] Consequently, the Commission contracted with US Ecology, Inc.[15] ("USE") to file a license application for a disposal facility in Nebraska.[16] USE selected a site in Boyd County, Nebraska[17] for the waste disposal facility and in July 1990 USE submitted a disposal license application to the state.[18]

Almost fifteen years have passed since Nebraska was chosen to host the waste facility, and not a single ton of radioactive waste from the other four party states has been disposed in Nebraska. In fact, there has yet to be a ground breaking for the construction of the proposed Boyd County facility. The delay is attributable to a torturously slow licensing process (administered by Nebraska agencies) and the veritable slew of litigation that resulted from it.[19] The delays have

11. *See id.*
12. *See id.*
13. *See Neighbors Dump on Nebraska*, L.A. TIMES, Dec. 15, 1987, at 1.
14. *See* Compact, art. III(b).
15. US Ecology, Inc. is a California corporation that contracts out to develop, license, and operate radioactive waste facilities.
16. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 983 (8th Cir. 2001).
17. Boyd County, Nebraska is a county in North Central Nebraska that borders South Dakota.
18. *See* Joint Brief of Appellees at 8, Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001) (No. 99-4265).
19. Over the past eight years there have been no less than six other significant suits involving the licensing process. *See* Nebraska v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 187 F.3d 982 (8th Cir. 1999) (affirming the district court's ruling that the Compact gave the Commission the authority to impose a reasonable deadline for completion of the licensing review process); Nebraska v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 29 F. Supp. 2d 1085 (D. Neb. 1998) (holding that Nebraska did not have the right to veto an export license approved by a majority of the Commission); Nebraska *ex rel.* Nelson v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 902 F. Supp. 1046 (D. Neb. 1995) (holding that Nebraska had no right to have an additional member appointed to the Commission); County of Boyd v. US Ecology, Inc., 858 F. Supp. 960 (D. Neb. 1994) (holding that Boyd County and its Local Monitoring Committee's fraud claim against USE regarding community consent were barred by res judicata because of earlier suits brought by Nelson and Nebraska), *aff'd*, 48 F.3d 359 (8th Cir. 1995), *cert. denied*, 516 U.S. 814 (1995); Nebraska *ex rel.* Nelson v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 4:CV93-3367, 1993 WL 738576 (D. Neb. Dec. 3, 1993) (holding that Nebraska and Nelson's community

cost those involved with securing the proposed license tens of millions of dollars.[20] Consequently, the Commission, USE, and the generators of low-level radioactive waste within the party states whose waste will predominately occupy the new facility (collectively, the "Generators"),[21] are now looking to recover from Nebraska[22] those tens of millions of dollars spent during the licensing process. They have filed their claims in the United States federal district court in Nebraska and allege that Nebraska has acted in bad faith by delaying the processing of (and eventually denying) the application for the Boyd County waste disposal facility license that the Commission is required to secure in order to construct and operate the proposed facility.

In its defense, Nebraska claimed Eleventh Amendment immunity from suit. The claim was summarily rejected by the United States District Court.[23] The district court determined that Nebraska was not immune from the suits of the Commission, Generators and USE.[24] The Eighth Circuit, in *Entergy Arkansas, Inc. v. Nebraska*,[25] upheld the ruling in regard to the Commission's suit and determined that Nebraska, by assenting to the Compact's consent to suit and venue provisions, waived its Eleventh Amendment immunity from the Commission. However, the Eighth Circuit reversed the district court's order as it pertained to the claims of USE and the Generators, reasoning that USE and the Generators were neither a party to, nor a third-party beneficiary of, the Compact. Consequently, the Eighth Circuit held that Nebraska did not waive its immunity from the claims of USE and the Generators.

The Eighth Circuit's decision that Nebraska is not immune from the Commission's suit could have enormous implications, as Nebraska's potential liability, including interest and attorneys' fees,

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consent suit was barred by the earlier suit); Nebraska *ex rel.* Nelson v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 834 F. Supp. 1205 (D. Neb. 1993) (holding that Nebraska and Nelson's claim that community consent was needed for construction of a waste disposal facility was untimely and barred by equitable estoppel and laches), *aff'd*, 26 F.3d 77 (8th Cir. 1994).

20. *See* Entergy Ark., Inc. v. Nebraska, 46 F. Supp. 2d 977, 978 (D. Neb. 1999).
21. The following entities comprise the Generators: Entergy Arkansas, Inc., Entergy Gulf State, Inc., Entergy Louisiana, Inc., Wolf Creek Nuclear Operating Corp., and Omaha Public Power District.
22. The Commission is the only party that has a pending direct claim against Nebraska, as the Generators' claims against Nebraska have been dismissed. *See* Entergy Ark., Inc. v. Nebraska, 161 F. Supp. 2d 1001 (D. Neb. 2001). However, the Generators remain a party to the suit and have equitable subrogation and cross claims against the Commission.
23. Judge Kopf is the judge assigned to the case.
24. See Entergy Ark., Inc. v. Nebraska, 68 F. Supp. 2d 1093 (D. Neb. 1999) (holding that Nebraska was not immune from the Commission's suit); Entergy Ark., Inc. v. Nebraska, 68 F. Supp. 2d 1104 (D. Neb. 1999) (holding that Nebraska was not immune from the Generators and USE's suit).
25. 241 F.3d 979, 988 (8th Cir. 2001).

could exceed $160 million.[26] A damages award of this kind would be crippling to a state's budget anytime, however, its effect would be exacerbated in these tight fiscal times when Nebraska's budget is already stretched thin.[27]

This Note will compare Nebraska's Compact to other disputes involving interstate compacts where state sovereign immunity has been claimed to see whether the Eighth Circuit's decision that Nebraska waived its immunity to suit from the Commission is consistent with United States Supreme Court precedent. The Background section will lay out the history and current state of Eleventh Amendment jurisprudence, as well as document the history of the controversy surrounding the proposed Boyd County waste facility. The Analysis section will focus on the Eighth Circuit's holding in *Entergy Arkansas, Inc. v. Nebraska*, as it pertains to Nebraska's waiver of immunity to the Commission's claims. Special attention will be paid to the consent to suit and venue provisions within the Compact, as it is from this language that a state's waiver of immunity is most often derived. The Analysis section will also opine that the overwhelming implication of the Compact's text left no room for the Eighth Circuit to make any other reasonable interpretation but that the party states, including Nebraska, had waived their immunity to suits from the Commission in federal court. While the Eighth Circuit applied the constitutionally required stringent analysis to the Compact's language, thereby giving every presumption to non-waiver of sovereign immunity, it was unable to give the Compact's consent to suit provision any meaningful effect without concluding that the provision subjected Nebraska to suit.

II. BACKGROUND

A. License Application Review Process Begins

Shortly after the selection of Nebraska as host of the waste disposal facility, the Commission contracted with USE to prepare and submit a waste disposal license application to Nebraska. Nebraska law required that USE pay all costs associated with licensing,[28] but pursuant to a separate agreement between the Commission and USE the Commission was to reimburse USE for the licensing costs at a later date. The Commission subsequently entered into agreements with

26. *See* Kevin O'Hanlon, *Nuclear Waste Legal Bills Mounting*, LINCOLN J. STAR, Oct. 16, 2001, at 2.

27. Nebraska faced a tremendous budget shortfall in fiscal year 2001-2002. In October 2001, the governor was required to summon the Nebraska Legislature for a special session where it had to trim $173 million from the state's budget in order to meet the tax revenue shortfall. *See* Robynn Tysver, *Johanns, Legislative Committee Agree on $172 Million in Cuts*, OMAHA WORLD-HERALD, Nov. 2, 2001, at 1A, *available at* LEXIS, New Library, Omaha World Herald File.

28. *See* NEB. REV. STAT. § 81-1579(2) (Reissue 1999).

the Generators[29] whereby they would fund the Commission for its reimbursement costs to USE.[30]

USE submitted its license application for the waste disposal facility in July 1990 to two Nebraska agencies, the Department of Environmental Quality ("DEQ") and the Department of Health and Human Services and Licensure ("HHS"). As part of the application process, DEQ and HHS required USE to answer 700 questions before it would review the application.

B. New Administration Takes Office

In January 1991, newly elected Nebraska Governor E. Benjamin Nelson took office. During the election, Nelson promised that if he were elected, "it is not likely that there will be a nuclear dump in Boyd County or in Nebraska."[31] Nelson made this statement despite Nebraska's contractual obligation (pursuant to the Compact) to house the waste facility. After taking office, Governor Nelson's new administration appeared to take steps to fulfill the Governor's campaign promise. Following Nelson's appointment of Randolph Wood as Director of DEQ in July 1991, Nebraska no longer exchanged information with USE.[32] Furthermore, in December 1991, Nebraska stated that it would no longer accept USE's responses to the 700 questions as they were completed, but rather would only accept them *en masse*. Accepting the questions *en masse* rather than as they were completed only added to the time and cost of completing them.[33]

In January 1993, following USE's submission of the 700 answers, DEQ and HHS issued a Notice of Intent to Deny the license, citing drainage problems and the presence of wetlands on the proposed Boyd County site.[34] In response, USE opened a contested case administrative proceeding under Nebraska law to challenge Nebraska's decision.[35] However, USE later withdrew its contest and instead amended its application for the waste disposal site after reaching a settlement with Nebraska in which Nebraska pledged to accelerate its review process.[36]

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29. The Generators of the radioactive waste stood to benefit the most from the creation of a low-level radioactive waste disposal facility, as such a facility would provide them a badly needed location to dispose of the great amounts of waste that they were generating and currently storing themselves.
30. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 983 (8th Cir. 2001).
31. *See* Entergy Ark., Inc. v. Nebraska, 46 F. Supp. 2d 977, 981-82 (D. Neb. 1999) (quoting a public statement made by Nelson).
32. *See id.* at 982.
33. *See id.* at 983.
34. *See id.*
35. *See id.*
36. *See* Entergy Ark., Inc. v. Nebraska, 46 F. Supp. 2d 977, 983 (D. Neb. 1999).

Nebraska's review process continued following USE's submission of the amended application.[37] However, in March 1995 the process hit a significant roadblock when Nebraska directed its primary private contractor associated with the review of USE's license application to reduce its billings (and consequently its work on the application review process) by 25 percent.[38] Nebraska claimed that there was insufficient cash flow to pay for its review activities in connection with USE's application because of the Commission's refusal to advance federally provided "rebate" funds.[39] The rebate funds were provided to the Commission under federal statute and had been forwarded to Nebraska during the review process.[40] The debate over the rebate funds produced litigation[41] that Nebraska and the Commission eventually settled when Nebraska agreed to accelerate the review process in exchange for a portion of the rebate funds.[42]

USE's application for construction of the waste disposal facility was complete in June 1995.[43] However, DEQ and HHS indicated that their review of the application would take one more year to complete.[44] One year later Nebraska was not close to completing its review.[45] Consequently, in September 1996 the Commission imposed a January 14, 1997 deadline on Nebraska to complete its review of USE's application.[46] Nebraska then sued the Commission in federal court to have the Commission-imposed deadline lifted. The district court held, and the Eighth Circuit affirmed, that the Commission had the authority under the Compact to set the deadline.[47]

37. *See id.*

38. *See id.*

39. *See* Brief for Appellants at 7-8, Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001) (No. 99-4263).

40. *See* Entergy Ark., Inc. v. Nebraska, 46 F. Supp. 2d 977, 983 (D. Neb. 1999). The rebate funds were provided by the United States Department of Energy from disposal surcharges collected from generators of waste, including the plaintiff-Generators.

41. Nebraska sued the Commission in federal district court to recover the "rebate" funds. However, this initiation of suit in federal court by Nebraska in no way represents a separate waiver of Eleventh Amendment immunity. *See* Clark v. Barnard, 108 U.S. 436 (1883) (stating that the mere appearance of a state in federal court by the state does not waive its immunity); *see also* Compact, art. IV(l) (authorizing party states aggrieved by Commission decisions to obtain judicial review in U.S. District Court).

42. *See* Entergy Ark., Inc. v. Nebraska, 46 F. Supp. 2d 977, 983 (D. Neb. 1999).

43. *See* Brief for Appellants at 8, Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001) (No. 99-4263).

44. *See id.*

45. *See id.*

46. *See id.*

47. *See* Nebraska v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 187 F.3d 982 (8th Cir. 1999).

DEQ later notified USE that the review would take longer than the one year time frame earlier indicated because two technical documents necessary for the review would not be completed until October of 1997.[48] When the technical documents were released by DEQ, they indicated that USE's proposed Boyd County facility met the site suitability requirements.[49] Yet, despite seemingly meeting all of DEQ's technical site requirements, Nebraska's review of USE's application continued.[50]

C. Rejection of License and Ensuing Litigation

In December 1998, over eight years after USE submitted its original application, Nebraska denied USE's waste disposal license request.[51] Nebraska's reasons for denying the application included an insufficient water table depth at the proposed Boyd County site, DEQ's inability under applicable regulations to consider engineered improvements to the site, and USE's failure to demonstrate financial ability to build and run the facility.[52] USE appealed the denial of its license application by filing a contested case petition with DEQ in January 1999.[53]

While USE's contested case petition was pending before DEQ, the Generators initiated the action that spawned the opinion upon which this Note is based.[54] The Generators, frustrated by the delays in the Nebraska licensing process and the soaring licensing costs for which they had contractually agreed to reimburse, asserted claims against the Commission, Nebraska, and various Nebraska officials and agencies.[55] Shortly thereafter, USE intervened as a plaintiff and the Commission was realigned from defendant to plaintiff. The primary claim of every plaintiff was that Nebraska acted in bad faith while denying USE's application for a license to construct the proposed low-level radioactive waste disposal facility at the Boyd County site.[56]

The Generators and USE sought injunctive and declaratory relief, removal of state officials from the licensing procedure, an accounting, and attorneys' fees.[57] The Commission sought damages, an accounting, declaratory relief, removal of Nebraska from the licensing process, and the appointment of an impartial third party to complete the

48. *See* Brief for Appellants at 9, Entergy Arkansas, Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001) (No. 99-4263).
49. *See* Entergy Ark., Inc. v. Nebraska, 46 F. Supp. 2d 977, 984-85 (D. Neb. 1999).
50. *See id.*
51. *See id.* at 985.
52. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 984 (8th Cir. 2001).
53. *See id.*
54. *See id.*
55. *See id.*
56. *See* Entergy Ark., Inc. v. Nebraska, 68 F. Supp. 2d 1093, 1094 (D. Neb. 1999).
57. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 984 (8th Cir. 2001).

licensing process.[58] The Generators and USE also filed an equitable subrogation cross-claim against the Commission for any damages award the Commission should receive from Nebraska.

The bad faith claims of the plaintiffs derived both from the Compact's "good faith" provisions and Nebraska's implicit obligation to perform its Compact obligations in good faith.[59] The Compact provides that "[e]ach party state has the right to rely on the good faith performance of each other party state."[60] Additionally, the Compact empowers the Commission to "require the appropriate state or states . . . to process all applications for permits and licenses required for the development and operation of any regional facility or facilities within a reasonable period from the time that a completed application is submitted."[61] In support of their bad faith claims, the plaintiffs set out detailed factual allegations alleging that Nebraska and its officials deliberately delayed review of USE's license application for eight years and intended that the process end in denial of the application.[62] The facts surrounding these allegations provide compelling evidence that Nebraska will probably be found liable for acting in bad faith, as the district court has strongly hinted that the Commission is likely to prevail on its bad faith claims.[63]

D. Eighth Circuit Holding and its Significance

The Eighth Circuit opinion that is the subject of this Note was a consolidation of two interlocutory appeals of the district court's denial of Nebraska's motions seeking Eleventh Amendment immunity and the dismissal of claims brought by the Commission, the Generators, and USE.[64] The three-judge Eighth Circuit panel carefully weighed Nebraska's immunity claims and rejected them with regard to the Commission's suit, but granted Nebraska immunity to the claims of the Generators and USE reasoning that they were neither parties to, nor third-party beneficiaries of, the Compact. In denying Nebraska's motion for dismissal, the court noted that it had already denied Ne-

58. *See* Entergy Ark., Inc. v. Nebraska, 68 F. Supp. 2d 1093, 1094 (D. Neb. 1999).
59. *See, e.g.*, JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 11.38, at 457-61 (4th ed. 1998) (describing the implicit obligation of good faith and fair dealing that modern courts apply to contract interpretation).
60. Compact, art. III(f).
61. Compact, art. V(e)(2).
62. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 984 (8th Cir. 2001).
63. *See* Entergy Ark., Inc. v. Nebraska, 46 F. Supp. 2d 977, 994 (D. Neb. 1999) (stating that "[t]he Commission is likely to prevail on the merits" because there has been a "substantial showing" that Nebraska has acted in bad faith).
64. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 982 (8th Cir. 2001) (affirming district court's denial of Nebraska's motion to dismiss Commission's complaint (68 F. Supp. 2d 1093 (D. Neb. 1999)), but vacating and remanding district court's denial of Nebraska's motion to dismiss the Generators' complaint (68 F. Supp. 2d 1104 (D. Neb. 1999))).

braska's Eleventh Amendment immunity claim in a previous preliminary injunction appeal[65] and held that Nebraska, by assenting to the Compact's language, waived its immunity from claims by the Commission, including claims for damages.[66] The court partook in a contractual interpretation of the Compact's language and concluded that "[b]y entering into a compact in which the party states delegated to the Commission their authority to sue for breach and required the Commission to enforce contractual obligations, Nebraska waived its Eleventh Amendment immunity from suit by the Commission in federal court."[67] Nebraska petitioned for certiorari to the United States Supreme Court to review the Eighth Circuit's ruling,[68] but the Supreme Court denied it.[69] Consequently, Nebraska remains subject to the Commission's suit in federal court for claims arising under the Compact. The district court is set to hear opening arguments regarding the Commission's bad faith claims against Nebraska on June 3, 2002.[70]

The Commission's claims pose an enormous threat to Nebraska's treasury.[71] The ramifications of the Eighth Circuit's decision are significant not only for the State of Nebraska and its citizens, who will ultimately be responsible for paying any money judgment to the Commission, but also for other states that have entered into similar compacts.[72] Furthermore, the court's decision that Nebraska waived its sovereign immunity and consented to suit by the Commission in federal court affects the fundamental constitutional balance between the federal government and the states.[73] Consequently, this Note's analy-

65. *See* Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 897 (8th Cir. 2000).

66. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 987 (8th Cir. 2001) (stating that "[w]e carefully considered the Eleventh Amendment issue before deciding it in the course of the preliminary injunction appeal, and our holding that Nebraska waived its immunity from claims by the Commission, including claims for damages, is now the law of the case.") (citations omitted).

67. *Id.* at 988.

68. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 2863 (U.S. July 17, 2001) (No. 01-87).

69. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001), *cert. denied sub nom.*, Nebraska v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 122 S. Ct. 203 (2001) (mem.) (No. 01-87).

70. The trial is scheduled to last seven weeks and will be a bench trial. *See* Entergy Ark., Inc. v. Nebraska, No. 4:98CV3411, 2002 U.S. Dist. LEXIS 3002 (D. Neb. Feb. 22, 2002).

71. *See* O'Hanlon, *supra* note 26, at 2.

72. There are ten other low-level radioactive waste compacts that have been enacted in accordance with federal law. These compacts include the vast majority of the states, however, none of them have enforcement mechanism provisions comparable to Nebraska's Compact. *See* Brief in Opposition to Petition for Writ of Certiorari at 21-22 n.1, Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001), *cert. denied sub nom.* Nebraska v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 122 S. Ct. 203 (2001) (mem.) (No. 01-87).

73. *See, e.g.*, Dellmuth v. Muth, 491 U.S. 223, 227 (1989) (stating that the loss of a state's sovereign immunity can upset "the fundamental constitutional balance be-

sis will focus on the Eighth Circuit's holding that by entering into the Compact, Nebraska waived its Eleventh Amendment immunity to suits by the Commission in federal court.[74]

E. Eleventh Amendment Jurisprudence

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State."[75]

The Eleventh Amendment was enacted in reaction to the ill-received *Chisholm v. Georgia*[76] decision, in which the United States Supreme Court held that it had jurisdiction to hear a claim against Georgia brought by a citizen of South Carolina. Many abhorred the Court's position in *Chisholm* that a citizen could bring an action against a state in federal court.[77] The general sentiment among the states was that the Court was encroaching upon the sovereignty of the states.[78] Consequently, the Eleventh Amendment was proposed and ratified within five years of the decision.[79]

The Supreme Court's interpretation of the Eleventh Amendment has been inconsistent and fragmented.[80] Read literally, the Eleventh Amendment would appear to only bar suits against states brought by citizens of other states or citizens of foreign countries. However, the Court has construed the Amendment much more broadly than the text,[81] and has interpreted the Amendment as providing states with

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tween the Federal Government and the States" (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985))).

74. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 987 (8th Cir. 2001) (citing Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 897 (8th Cir. 2000)).

75. U.S. CONST. amend. XI.

76. 2 U.S. (2 Dall.) 419 (1793). The Supreme Court reasoned that the sovereign immunity of the states was qualified by the general jurisdiction provisions of Article III.

77. *See* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977); *see also* 1 RONALD D. ROTUNDA & JOHN F. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.12 (2d ed. 2000).

78. *See* ROTUNDA & NOWAK, *supra* note 77, § 2.12; Field, *supra* note 77, at 520-23.

79. *See* ROTUNDA & NOWAK, *supra* note 77, § 2.12.

80. *See, e.g.*, Dellmuth v. Muth, 491 U.S. 223, 224 (1989) (5-4 decision); Pennsylvania v. Union Gas Co., 491 U.S. 1, 3 (1989) (plurality opinion), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66 (1995) (5-4 decision); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 235 (1985) (5-4 decision); Parden v. Terminal Ry. Of Ala. Docks Dep't, 377 U.S. 184, 198 (1964) (5-4 decision), *overruled in part by* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 478 (1987) (plurality opinion); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 283 (1959) (5-3 decision).

81. *See* Hans v. Louisiana, 134 U.S. 1 (1890). *Hans* is the seminal case marking the Supreme Court's extra-textual interpretation of the Eleventh Amendment. In

an expansive right of sovereign immunity that is based in principles that are fundamental to the constitutional design.[82] Despite a lack of textual foundation, the Eleventh Amendment has been interpreted as providing states immunity from suits from broader constituencies than those indicated within the text of the Amendment.[83] This broad interpretation of the Eleventh Amendment has been termed by one scholar as "nontextual originalism" because the Court has looked beyond the text of the Amendment to the backdrop of sovereign immunity principles that were said to be well-accepted and presumed by the Founding Fathers.[84] This extra-textual approach of the Court has been the source of much criticism.[85] However, the approach helps explain the elasticity of the Court's interpretations of the Amendment throughout history.[86]

The seminal case for the Court's expansive interpretation of states' Eleventh Amendment immunity is *Hans v. Louisiana*.[87] In *Hans*, a Louisiana citizen brought suit against that state in federal court seeking damages for the value of bonds that Louisiana had issued but later repudiated.[88] A unanimous Supreme Court ruled that the Eleventh Amendment, despite the seemingly narrow scope of its language, barred suits against states in federal courts by their own citizens.[89]

Hans, the Court held that the Eleventh Amendment, by implication, also bars suits by citizens of the defendant state.

82. *See* Alden v. Maine, 119 S. Ct. 2240, 2254 (1999) (stating that "[t]he Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.")

83. *See supra* text accompanying notes 90-92.

84. *See* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1345 (1989).

85. For articles supporting the view that the Eleventh Amendment was drafted for narrow construction, see William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment and State Sovereign Immunity*, 98 YALE L.J. 1 (1988). *See also* Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 309-10 (1990) (Brennan, J., dissenting) (maintaining that the proper interpretation of the Eleventh Amendment is a literal interpretation that limits states' immunity to suits from citizens of other states or foreign countries only). For articles endorsing a more expansive interpretation of the Eleventh Amendment, see Marshall, *supra* note 84; William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989).

86. *See* ROTUNDA & NOWAK, *supra* note 77, § 2.12.

87. 134 U.S. 1 (1890).

88. *See id.* at 1-3.

89. *See id.*

The only exception to this rule noted by the Court was if the state had waived its immunity.[90]

Hans provided the Court the essential bridge to extend states' sovereign immunity beyond the textual landscape of the Eleventh Amendment. In addition to barring suits against states by their own citizens, the Court has held that the Eleventh Amendment bars suits against states that are brought by foreign states[91] and Indian tribes.[92] Furthermore, the Court has held that states retain their sovereign immunity regardless of whether the suit is in state or federal court, falls under diversity or federal question jurisdiction, or whether the suit is brought in admiralty, as opposed to law or equity.[93]

F. Recognized Exceptions to Eleventh Amendment Immunity

Despite the Court's expansive interpretation of Eleventh Amendment immunity in the aforementioned instances, the Court has also shown a willingness to curtail the scope of Eleventh Amendment immunity. For instance, the Court has held that the Eleventh Amendment does not bar states from initiating actions against other states.[94] The Court has also held that the Amendment does not preclude suits by the federal government against states.[95] Furthermore, the Court has recognized that the Eleventh Amendment does not interfere with Congress' authority to abrogate state immunity from suit under Section 5 of the Fourteenth Amendment,[96] nor does the Amendment cir-

90. *See id.*
91. *See* Alden v. Maine, 119 S. Ct. 2240, 2254 (1999); Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).
92. *See Alden,* 119 S. Ct. at 2254; Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).
93. *See Alden,* 119 S. Ct. at 2254; *Ex parte* New York, 256 U.S. 490 (1921).
94. *See* South Dakota v. North Carolina, 192 U.S. 286, 315-21 (1904); Rhode Island v. Massachusetts, 37 U.S. 657 (1838).
95. *See* United States v. Texas, 143 U.S. 621, 644 (1892).
96. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Congress has Section 5 abrogation authority because "the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996). However, more recent cases dealing with Section 5 of the Fourteenth Amendment indicate that Congress's abrogation power may have a more narrow reach. *See* Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631 (2000) (holding Age Discrimination in Employment Act not validly enacted under Section 5 of the Fourteenth Amendment because its provisions did not comport with Equal Protection Clause protections against age discrimination and because Congress did not identify a pattern of state bias against workers based on age); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2224-25 (1999) (holding Lanham Act not validly enacted pursuant to Section 5 of Fourteenth Amendment because freedom from false advertising by a competitor and security of business were not "property" under the Due Process Clause); Fla. Pre-

cumscribe the Court's appellate jurisdiction over federal question cases originating from state court.[97]

Another example of the Court's curtailment of states' Eleventh Amendment immunity was the court's ruling in *Ex parte Young*[98] that the Eleventh Amendment does not bar actions for prospective relief brought by individuals in federal court against state officials who violated federal law while acting within the scope of their duties. In *Ex parte Young*, stockholders in a railroad company brought an injunctive suit in federal court against the Minnesota State Attorney General for attempting to enforce an unconstitutional law.[99] The Court based its decision to enjoin the Attorney General from enforcing the unconstitutional law on a fiction that because a state officer could not be given authority to violate federal law, the suit was not against the state itself so the Eleventh Amendment did not apply.[100]

Ex parte Young marked a significant crack in the broad immunity shield the Eleventh Amendment had provided states for over a century. After *Ex parte Young*, state officials could no longer rely upon their state's Eleventh Amendment immunity to shield them from equity suits in federal court.[101] However, it should be noted that claims brought under the *Ex parte Young* theory are limited in that they only allow for prospective relief and thus preclude the recovery of money damages.

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paid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 119 S. Ct. 2199, 2207 (1999) (holding Patent and Plant Protection Remedy Clarification Act not validly enacted pursuant to Section 5 of the Fourteenth Amendment in part because "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations"); City of Boerne v. Flores, 521 U.S. 507 (1997) (finding Freedom of Restoration Act surpassed Congress's power under Section 5 of the Fourteenth Amendment because it fundamentally altered constitutional rights and thus was not remedial in nature).

97. *See* McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 26-27 (1990); Smith v. Reeves, 178 U.S. 436 (1900); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). However, a state can prevent the initial private suit from being commenced by relying on state common law immunity principles, state constitutional prohibitions, or state regulatory restrictions. These state law restrictions are particularly important in light of *Alden*, where the Court made clear that Congress cannot abrogate a state's immunity in its own state courts with regard to private party claims brought under federal law.

98. 209 U.S. 123 (1908).

99. *See id.* at 131.

100. *See* ROTUNDA & NOWAK, *supra* note 77, § 2.12.

101. *See* Edelman v. Jordan, 415 U.S. 651, 664 (1974) (explaining that under *Ex parte* Young, a government official was not immune from a federal action based on a constitutional violation).

G. Consent to Suit and the Waiver Doctrine

Like other constitutional rights and privileges,[102] it has long been recognized that a state may waive its Eleventh Amendment sovereign immunity at its pleasure.[103] The state's decision to waive its immunity is completely voluntary[104] and the test for determining whether a state has waived its immunity from federal court jurisdiction is a stringent one[105] that is to be applied by federal court judges.[106] Federal judges are to "indulge every reasonable presumption against waiver" when interpreting whether a state has waived its sovereign immunity.[107]

The conclusion that a state has consented or waived its Eleventh Amendment immunity to suit has traditionally not lightly been drawn.[108] The U.S. Supreme Court has stringently scrutinized language that has been alleged to constitute a state's waiver to suit in federal court.[109] General consent to suit provisions will not suffice to constitute waiver of a state's sovereign immunity in federal court.[110] Instead, general consent to suit provisions will be narrowly construed to only encompass the state waiving its immunity in state court, as opposed to federal.[111] As such, a state does not submit to lower federal court jurisdiction by consenting to suit in its own courts,[112] by stating its willingness to "sue and be sued,"[113] or even by authorizing suits against it in "any court of competent jurisdiction."[114] Perhaps the Court's best expression of its test for states' waiver of Eleventh

102. Other waivable constitutional rights include the right to a jury trial in a criminal trial, the right to confront one's accuser in criminal trial, and the due process rights attached to personal jurisdiction.
103. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2226 (1990) (citing Clark v. Barnard, 108 U.S. 436, 447 (1883)).
104. *See id.* at 2226.
105. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985).
106. *See* Cuyler v. Adams, 449 U.S. 433, 438 (1981) (stating that "the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question").
107. Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 99 (1984).
108. *See Atascadero*, 473 U.S. at 241; Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944).
109. *See Atascadero*, 473 U.S. at 241 (stating that the "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one").
110. *See id.* (stating that general consent to suit provision did not waive Eleventh Amendment immunity because the "provision does not specifically indicate the State's willingness to be sued in federal court").
111. *See Great Northern*, 322 U.S. at 54 (stating that "[w]hen a state authorizes a suit against itself . . . , it is not consonant with our dual system for the federal courts to be astute to read the consent to embrace federal as well as state courts").
112. *See* Smith v. Reeves, 178 U.S. 436, 441 (1900).
113. *See* Fla. Dep't of Health and Rehab. Serv. v. Fla. Nursing Home Ass'n, 450 U.S. 147, 149 (1981) (per curium).
114. *See* Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 578 (1946).

Amendment sovereign immunity was provided in *Edelman v. Jordan*[115] where the Court said that "[i]n deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."[116]

Prior to *Edelman*, such explicitness was not a prerequisite for waiver of state immunity. In *Pardon v. Terminal Railway*,[117] the Court ruled that employees of a railroad owned and operated by Alabama could sue the state for damages under the Federal Employers' Liability Act (FELA) despite the absence of any provision within the FELA statutory language referring to federal court jurisdiction over the states.[118] The Court held that Alabama had constructively waived its sovereign immunity to claims that arose by virtue of its operation of a railroad in interstate commerce.[119] The *Parden* decision marked the first enunciation of what has been termed the constructive or implied waiver doctrine. The constructive or implied waiver doctrine allowed courts to infer a state's waiver of sovereign immunity from its actions, as opposed to an express, unequivocal statute or a statute where the overwhelming implication of the language leaves no room for any other reasonable interpretation but a state's consent to suit. However, the *Parden* decision, like many of the Supreme Court's Eleventh Amendment decisions, was a sharply divided 5-4 decision.[120]

In the years following *Parden*, the Court refused to extend the constructive waiver doctrine to different fact patterns[121] and began to retreat from the constructive waiver doctrine altogether.[122] For example, in *Atascadero State Hospital v. Scanlon*,[123] the majority held that a state statute or constitutional provision had to specifically indicate "the State's intention to subject itself to suit in federal court" in order for it to be determined that a state waived its immunity.[124] It was argued by the plaintiffs in *Atascadero* that California waived its immunity to suit in federal court when it adopted language in its state

115. 415 U.S. 651 (1974).
116. *Id.* at 673 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)).
117. 377 U.S. 184 (1964).
118. *See id.*
119. *See id.* at 192.
120. For other sharply divided Eleventh Amendment opinions, see cases cited *supra* note 80.
121. *See* Employees of Dept. of Pub. Health and Welfare of Mo. v. Dep't of Pub. Health and Welfare of Mo., 411 U.S. 279 (1973).
122. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2227 (1999) (commenting that nine years after the *Parden* decision the Court began to retreat from the constructive waiver doctrine).
123. 473 U.S. 234 (1985).
124. *Id.* at 241.

constitution which stated that "[s]uits may be brought against the State in such a manner and in such courts as shall be directed by law."[125] The Court, however, did not agree with the plaintiffs and held that a general waiver of immunity, such as the waiver in California's state constitution, was not enough to subject a state to a suit in *federal* court, but was only sufficient to subject a state to suit in *state* court.[126]

After several decades of decisions limiting the constructive waiver doctrine in actions involving Eleventh Amendment immunity claims, the Court, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[127] took the dramatic step of completely rejecting the "constructive-waiver experiment."[128] In completely rejecting the constructive waiver doctrine, the Court was emphatic in stating that a state's waiver of sovereign immunity must be unequivocal.[129] According to the Court, a state must provide a "clear declaration" of its waiver to suit in order for it to lose its Eleventh Amendment immunity from suits in federal court.[130] The Court's decision to expressly renounce the constructive or implied waiver doctrine has further insulated states from being subjected to suit in federal court and has thus further fortified states' Eleventh Amendment immunity.

H. Congress's Abrogation of State Immunity

Throughout its history, Congress has had varying degrees of power to abrogate state immunity through legislative action.[131] Currently, the only recognized circumstance under which Congress's power to abrogate states' immunity is permitted is under Section 5 of the Fourteenth Amendment.[132] On occasion, the Court has also found that Congress' Article I commerce and spending powers enabled Congress to legislatively abrogate state immunity and provide for private rights

125. *See id.* at 241 (citing CAL. CONST. art. III, § 5).

126. *See id.* at 241 (finding that California did not waive its immunity to suit in federal court because the statutory language did not expressly and specifically waive the state's immunity in federal courts).

127. 119 S. Ct. 2219 (1999).

128. *Id.* at 2228 (stating that "[w]e think that the constructive-waiver experiment of *Parden* was ill conceived, and see no merit in attempting to salvage any remnant of it").

129. *See id.*

130. *See Coll. Sav. Bank*, 119 S. Ct. at 2228.

131. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976) (holding that the Eleventh Amendment does not impair Congress's ability to authorize private suits against states under its Fourteenth Amendment enforcement powers).

132. *See* ROTUNDA & NOWAK, *supra* note 77, § 2.12 (stating that normal federal court Eleventh Amendment jurisdictional rules do not limit Congress' power to enforce the Fourteenth Amendment upon the states).

of action against states.[133] However, this proposition that Article I powers enable Congress to abrogate state immunity from private suit was rejected by the Court in *Seminole Tribe of Florida v. Florida*[134] when the Court held that the commerce and spending powers conferred by Article I provide Congress no authority to abrogate state sovereign immunity.[135]

Abrogation analysis is fundamentally different from waiver analysis in that abrogation concerns congressional authority, whereas waiver deals exclusively with a state's voluntary relinquishment of its right to immunity from suit. During the era when Congress's authority to regulate under Article I was virtually unlimited, there was hardly any distinction between abrogation and waiver analyses, as both applied a comparable solicitude for states' sovereign immunity.[136] However, as the Court has curtailed congressional authority during the past decade,[137] the two analyses have diverged somewhat. For example, in *Seminole Tribe* the Court held that Article I did not provide Congress authority to abrogate states' sovereign immunity to suit in federal court.[138] Shortly thereafter the Court went a step further in *Alden v. Maine*[139] when it held that Congress, in addition to not being able to abrogate states' sovereign immunity in federal courts under Article I, could not do so in state courts as well.[140] As *Seminole Tribe* and *Alden* illustrate, Congress's ability to abrogate sovereign immunity has diminished with the Court's curtailment of congres-

133. The most notable example of an Article I power that the Court had found to enable Congress to abrogate states' Eleventh Amendment immunity is the Commerce Power. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (holding that a congressionally passed environmental statute that was enacted under Congress' commerce power subjected states to liability for the costs of cleaning up hazardous waste).

134. 517 U.S. 44 (1996).

135. *See id.* at 76 (holding that the Eleventh Amendment imposes a constitutional limit on federal jurisdiction that Congress may not ignore when enforcing Article I legislation against the states).

136. *See* Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990) (explaining that the standard employed for abrogation analysis is similar to that employed for waiver analysis).

137. *See* Printz v. United States, 521 U.S. 898 (1997) (finding the Brady Handgun Violence Prevention Act unconstitutional insofar as it required state law enforcement officers perform background checks because Congress cannot compel state executive officials to implement a federal regulatory scheme); United States v. Lopez, 514 U.S. 549 (1995) (declaring the Gun-Free School Zones Act of 1990 unconstitutional because Congress surpassed its commerce power by regulating gun possession, which does not substantially affect interstate commerce).

138. *See Seminole Tribe*, 517 U.S. at 73 (stating that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction").

139. 527 U.S. 706 (1999).

140. *See id.* at 754 (stating that "the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation").

sional authority. In contrast, the Court's waiver analysis has been unaffected by the Court's curtailment of congressional powers, as waiver analysis focuses on the unrelated issue of state sovereignty.

Although the Compact is technically federal law,[141] the Eighth Circuit correctly applied waiver analysis to Nebraska's sovereign immunity claim, as the Compact was essentially a contract between Nebraska and the party states.[142] While an argument could be made for the application of an abrogation analysis to Nebraska's claim, the waiver analysis is better suited, as Congress simply sanctioned the Compact and had no intent to abrogate the party states' Eleventh Amendment immunity. In *College Savings Bank*, the Court stated that sovereign immunity cases involving interstate Compacts are "fundamentally different" from cases involving Congress's use of its Article I powers to extract constructive waivers of states' sovereign immunity.[143] The Court noted that Congress's granting of consent of interstate compacts is merely a gratuity and is not comparable to an affirmative exercise of congressional power. Thus, the Eighth's Circuit's application of a waiver analysis to the Compact, as opposed to an abrogation analysis, was appropriate.[144]

III. ANALYSIS

The Eighth Circuit's holding that Nebraska waived its Eleventh Amendment immunity to suits from the Commission in federal court, even suits for damages, is in line with United States Supreme Court

141. *See* Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, tit. II, § 222, 99 Stat. 1859, 1863-71 (1986).

142. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 988 (8th Cir. 2001) (stating that "[a] Compact between states is 'after all a contract. . . . It remains a legal document that must be construed and applied in accordance with its terms. . . . There is nothing in the nature of compacts generally . . . that counsels against rectifying a failure to perform in the past as well as ordering future performance called for by the Compact.'" (quoting Texas v. New Mexico, 482 U.S. 124, 128 (1987)).

143. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2231 (1999).

144. Although *Seminole Tribe* significantly restricted the use of the abrogation of sovereign immunity, the case law suggests that abrogation could be a viable argument in sovereign immunity disputes that involve congressionally sanctioned interstate compacts. In *College Savings Bank*, Justice Scalia, writing for the majority, stated that the Compact Clause is "fundamentally different" from other Article I abrogation cases because the states "*cannot* form an interstate compact without first obtaining the express consent of Congress." Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2231 (1999). Despite Justice Scalia's intimation about Congress's authority to abrogate under the Compact Clause, the waiver analysis is better suited for the Commission's claims because the Compact is essentially a contract between the party states, as they were the entities to negotiate and draft it.

precedent[145] and entirely appropriate given the Compact's consent to suit and venue provisions.[146] The Compact's consent to suit and venue provisions provide an overwhelming implication that the Compact's party states intended for the Commission to have the authority to enforce the Compact against breaching or non-complying party states in the lower federal courts.[147] The Compact was entered into by the states to address the dreadful and potentially disastrous national shortage of waste disposal facilities for low-level radioactive waste.[148] Given the severity of the disposal facility shortage and the considerable time and expense that was involved in negotiating and enacting the Compact,[149] it is doubtful that the party states intended to draft an essentially meaningless enforcement mechanism within the Compact. Consequently, broad consent to suit and venue provisions were incorporated within the Compact that were intended to encompass the lower federal courts.[150] Additionally, the party states created an administrative vehicle, the Commission, to oversee the Compact's objectives and granted it the authority to enforce the Compact's provisions.[151] Given the circumstances in which the Compact was created and the language the Compact employed, the Eighth Circuit could not help but conclude that Nebraska waived its immunity to suit from the Commission in federal court when it entered the Compact.[152]

The Eighth Circuit employed the constitutionally required stringent analysis to the Compact language.[153] This stringent analysis presumes that a state does not waive its Eleventh Amendment immunity unless there is an overwhelming implication from the textual language that provides no room for any other reasonable construction but waiver.[154] Unfortunately for Nebraska, the Compact's language left no other reasonable construction but that it, and the other party

145. *See* Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990).

146. *See supra* text accompanying notes 170-174.

147. *See supra* text accompanying notes 192-201.

148. *See* Compact, art. I.

149. The Compact itself is a long, carefully drafted document containing nine separate articles that took years to negotiate.

150. *See supra* text accompanying notes 170-174.

151. *See* Compact, art. IV(a).

152. *See supra* text accompanying notes 220-228.

153. The stringent analysis is required for Eleventh Amendment sovereign immunity claims because the submission of the states to suit in federal court threatens to upset "'the fundamental constitutional balance between the Federal Government and the States.'" *See* Dellmuth v. Muth, 491 U.S. 223, 227 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985)).

154. *See Atascadero*, 473 U.S. at 239-40 (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)).

states, waived their Eleventh Amendment sovereign immunity by entering the Compact.[155]

A. An Interstate Compact Is a "Creature of Federal Law"[156]

Interstate compacts are essentially congressionally sanctioned contracts between the states, as a compact is "a contract . . . that must be construed and applied in accordance with its terms."[157] The construction of interstate compacts that are sanctioned by Congress pursuant to the Compact Clause of the U.S. Constitution[158] presents a federal question that is within the purview of the federal judiciary.[159] The meaning of a compact is a question over which the Supreme Court of the United States has the final say,[160] as compacts are federal law by virtue of being congressionally sanctioned agreements.[161] Consequently, interpretation of compact language presents a federal question by which federal courts can exercise jurisdiction.[162]

The Central Interstate Low-Level Radioactive Waste Compact entered into by Nebraska meets the constitutional requirements for a compact under the Compact Clause because Congress officially sanctioned the Compact vis-à-vis the Ominbus Low-Level Radioactive Waste Interstate Compact Consent Act[163] and because Nebraska and the four other states assented to the Compact through their legislative enactment of the Compact.[164] These legislative acts by Congress and the party states validated the Compact and made it binding upon the assenting party states. However, the issue of this case is not whether the Compact is binding, as all parties have conceded that it is,[165] but rather what remedial or enforcement mechanisms are available to the Commission when a party state breaches the Compact or is in noncompliance with it. Specifically, the issue is whether the lower federal

155. *See supra* text accompanying notes 170 through 174.

156. The Eighth Circuit first stated that the Compact is a "creature of federal law" in *County of Boyd v. US Ecology, Inc.*, 48 F.3d 359, 361 (8th Cir. 1995) (citation omitted).

157. Texas v. New Mexico, 482 U.S. 124, 128 (1987).

158. *See* U.S. CONST. art. I, § 10, cl. 3.

159. *See* Del. River Comm'n v. Colburn, 310 U.S. 419, 427 (1940).

160. *See* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 28 (1951).

161. *See* Carchman v. Nash, 473 U.S. 716, 719 (1985).

162. *See* State *ex rel.* Nelson v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 834 F. Supp. 1205, 1210 (D. Neb. 1993) (asserting that federal courts have federal question jurisdiction over interpretation of interstate compacts under 28 U.S.C. § 1331).

163. Pub. L. No. 99-240, tit. II, § 222, 99 Stat. 1859, 1863 (1986).

164. *See, e.g.*, NEB. REV. STAT. § 81-1579 (Reissue 1999).

165. Neither Nebraska, the Generators, the Commission, nor USE dispute the validity of the Compact. *See generally* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001).

courts have authority to exercise jurisdiction[166] over a party state defendant (e.g., Nebraska) when sued by a Compact-created entity (e.g., the Commission).

B. The Eighth Circuit's Waiver Analysis in Regard to the Compact

The central issue in Nebraska's immunity claim is whether Nebraska waived its Eleventh Amendment sovereign immunity by entering into the Compact.[167] Determining whether Nebraska waived its immunity to suit depends entirely upon a stringent interpretation of the Compact language. The Eighth Circuit, in finding that Nebraska waived its Eleventh Amendment sovereign immunity, recognized the need for a stringent analysis with respect to determining if Nebraska waived its immunity to suit in federal court. It stated that "[a] waiver of immunity occurs when a state makes a clear declaration of its intention to submit to suit in federal court as evidenced by the language of the text or an overwhelming implication from the text as will leave no room for any other reasonable construction."[168] Applying this stringent analysis and presumption against waiver, the Eighth Circuit found that the language of the Compact "authorizes, and indeed requires, the Commission to enforce the obligations it imposes upon party states" in federal district court.[169]

The relevant language of the Compact the Eighth Circuit relied upon for purposes of its waiver analysis is contained within the Compact's consent to suit clause:[170]

> "The Commission shall . . . require all party states and other persons to perform their duties and obligations arising under this compact by an appropriate action in any forum designated in section e. of Article IV."[171]

166. *See* ROTUNDA & NOWAK, *supra* note 77, § 2.12. While it is customary to refer to the Eleventh Amendment as a jurisdictional bar, it should not be confused with the types of jurisdiction conferred by Article III, such as diversity or federal question jurisdiction. A state can waive its Eleventh Amendment immunity, whereas parties cannot waive the requirement of Article III jurisdiction.

167. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 987 (8th Cir. 2001); Entergy Ark., Inc. v. Nebraska, 210 F.3d, 887, 896 (8th Cir. 2000). Nebraska's sovereign immunity claim could also be characterized as one of abrogation, as the Compact was also enacted as a piece of federal legislation. *See* Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, tit. II, § 222, 99 Stat. 1859, 1865 (1986). However, it is more appropriate to characterize the issue as waiver as Nebraska passed the identical bill in the Nebraska Unicameral. *See* NEB. REV. STAT. § 71-3521 (Reissue 1996), *repealed by* NEB. REV. STAT. § 71-3522 (Cum. Supp. 2000) (effective Aug. 28, 1999).

168. Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 987 (8th Cir. 2001) (citation and quotations omitted).

169. Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 897 (8th Cir. 2000).

170. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 987 (8th Cir. 2001); Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 896 (8th Cir. 2000).

171. Compact, art. IV(m)(8).

Article IV(e), referred to by the consent to suit clause, designates the forum in which the Commission may enforce the obligations of the parties which provides:

> The Commission may initiate any proceedings or appear as an intervenor or party in interest before any court of law, or any Federal, state or local agency, board or Commission that has jurisdiction over any matter arising under or relating to the terms of the provisions of this compact. The Commission shall determine in which proceedings it shall intervene or otherwise appear and may arrange for such expert testimony, reports, evidence or other participation in such proceedings as may be necessary to represent its views.[172]

The Eighth Circuit centered its waiver analysis on these two provisions. Nebraska, on the other hand, pointed to different language within the Compact to support its position that the state did not waive its sovereign immunity by entering into the Compact. One such provision provides:

> The Commission may, by two-thirds affirmative vote of its membership, revoke the membership of any party state which, after notice and hearing, shall be found to have arbitrarily or capriciously denied or delayed the issuance of a license or permit to any person authorized by the Commission to apply for such license or permit.[173]

In another section, the Compact provides: "Any party state which fails to comply with the terms of this compact or fulfill its obligations hereunder, may, after notice and hearing, have its privileges suspended or its membership in the compact revoked by the Commission."[174]

Nebraska contended that the above provisions provided the *exclusive* remedy for the Commission against breaching or non-complying party states.[175] Consequently, Nebraska argued that if revocation or suspension of membership was the exclusive remedy the Commission had in regard to breaching party states, then the member states retained their sovereign immunity rights against the Commission.

The Eighth Circuit was not convinced by Nebraska's exclusive remedy argument.[176] The Eighth Circuit noted that "[n]othing in the Compact states that revocation or suspension of the states' membership is the exclusive enforcement mechanism."[177] Instead, the Eighth Circuit agreed with the Commission's argument that the Compact language demonstrated Nebraska's waiver of sovereign immunity.[178] Interpreting the consent to suit and venue clauses together, the court

172. Compact, art. IV(e).
173. Compact, art. V(g).
174. Compact, art. VII(e).
175. *See* Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 896 (8th Cir. 2000).
176. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 987 (8th Cir. 2001); Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 897 (8th Cir. 2000).
177. Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 897 (8th Cir. 2000).
178. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 987 (8th Cir. 2001); Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 897 (8th Cir. 2000).

found that the party states (including Nebraska) waived their Eleventh Amendment immunity from suit by the Commission in federal court because they delegated to the Commission their authority to sue for breach of the Compact and required the Commission to enforce each party state's Compact obligations.[179] Thus, the Eighth Circuit concluded that "[b]y entering into [the Compact], Nebraska waived its Eleventh Amendment immunity from suit by the Commission in federal court."[180]

C. Nebraska's Criticism of the Eighth Circuit Decision

Nebraska has argued that the Eighth Circuit utilized a lower standard than is required in deciding when a state has waived its Eleventh Amendment sovereign immunity when it found that Nebraska consented to suit by the Commission in federal court by assenting to the Compact.[181] Nebraska claimed that the Eighth Circuit broke entrenched Supreme Court precedent and inferred that Nebraska waived its sovereign immunity by entering into the Compact.[182] Nebraska and twelve amici curiae states[183] maintained that the Eighth Circuit had applied the rejected constructive waiver doctrine whereby a court construes that a state waived its Eleventh Amendment sovereign immunity in a less than explicit manner.[184] The constructive waiver doctrine, as was indicated earlier,[185] was completely rejected by the Supreme Court in *College Savings Bank* as a rationale for construing a state's waiver of its sovereign immunity.[186] Nebraska and the amici curiae states' basis for arguing that the Eighth Circuit in fact applied the constructive waiver theory in its decision is that nowhere in the Compact do the party states expressly consent to suit in

179. *See* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 988 (8th Cir. 2001).

180. *Id.*

181. *See generally* Petition for a Writ of Certiorari at 10-24, Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001), *cert. denied sub nom.* Nebraska v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 122 S. Ct. 203 (2001) (mem.) (No. 01-87).

182. *See id.*

183. Twelve states (Alaska, California, Florida, Hawaii, Mississippi, Missouri, Montana, North Carolina, Ohio, South Carolina, Utah, and West Virginia) submitted a brief of amici curiae to the U.S. Supreme Court supporting Nebraska's position that the Eighth Circuit broke from entrenched precedent in holding that Nebraska had waived its Eleventh Amendment sovereign immunity. *See* Brief of Amici Curiae States, Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001), *cert. denied sub nom.* Nebraska v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 122 S. Ct. 203 (2001) (mem.) (No. 01-87).

184. *See id.* at 1-6.

185. *See supra* text accompanying notes 126-131.

186. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2227-28 (1999).

federal court.[187] Thus, the argument goes, since there is no explicit consent to federal suit provision within the Compact, the only way for the Eighth Circuit to derive such consent is either by interpreting Nebraska's entry into the Compact as a constructive waiver or by applying an inappropriately loose canon of statutory construction[188] to the Compact's consent to suit and venue provisions.

Nebraska argued that the Eighth Circuit impugned a "core constitutional protection" by expansively construing the Compact's consent to suit provision's reference to "any court of law" as encompassing federal court.[189] And in so doing, Nebraska contended that the Eighth Circuit violated one of the basic principles of federalism—the sovereignty of the states.[190] According to Nebraska, immunity from suit is "a fundamental aspect of sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today."[191] Thus, by subjecting an "unconsenting" state to suit in federal district court, Nebraska asserted that the Eighth Circuit had disrupted the fundamental balance of federalism[192] that the Constitution requires.

D. Eighth Circuit Waiver Analysis On Point

Although it is understandable for Nebraska to be displeased with the Eighth Circuit's holding that it waived its immunity,[193] the Eighth Circuit's waiver analysis was on point in two respects. First, the Eighth Circuit's analysis of the Compact's language was consistent with the Supreme Court's analysis of other interstate compacts where a state's consent to suit in the lower federal courts has been disputed.[194] Precedent required the Eighth Circuit to interpret the

187. *See* Brief of Amici Curiae States at 1-3, *Centr. Interstate Low-Level Radioactive Waste Comm'n* (No. 01-87).

188. Nebraska essentially argues that the canon of statutory construction to be applied is that qualifying or limiting words or clauses (e.g., "federal") are only to be applied to the next preceding antecedent. Whereas, the Commission would counter that this rule of construction should not be applied when an evident sense and meaning require a different construction. *See generally* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950).

189. *See* Petition for a Writ of Certiorari at 12-13, Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 988 (8th Cir. 2001), *cert. denied sub nom.* Nebraska v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 122 S. Ct. 203 (2001) (mem.) (No. 01-87).

190. *See id.*

191. *See id.* at 12.

192. For an excellent analysis of the fundamental balance of federalism, see Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

193. Nebraska is after all on the hook for potentially over $160 million.

194. There are three U.S. Supreme Court cases that are instructive in determining what effect the Compact had on Nebraska's Eleventh Amendment sovereign immunity. *See* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 41-42 (1994)

Compact's consent to suit provisions stringently.[195] However, precedent also allowed the Eighth Circuit to use other textual evidence (e.g., venue selection clauses) within the Compact to resolve any ambiguity in the consent to suit provision.[196] Although the state's waiver should be express, a court is entitled to interpret waiver when the overwhelming implication of the text leaves no room for any other reasonable construction.[197]

Secondly, the Eighth Circuit's analysis was on point because interpreting the Compact's venue and consent to suit language any other way than it did would render those provisions essentially meaningless.[198] If the Compact did not entitle the Commission to bring suit in the lower federal courts as Nebraska had argued, there would be no other reasonable judicial venue to resolve disputes between the Commission and the party states.[199] Given that Nebraska's interpretation of the Compact would provide no reasonable judicial venue to settle disputes, its interpretation would be contrary to the traditional principle that for every right there must be a remedy,[200] in that the Compact would create rights for the Commission, yet according to Nebraska, the Commission would have no reasonable judicial forum to enforce those rights.[201]

(explaining that states agreed to federal courts having authority to hear disputes involving Compact Clause entities by virtue of the federal plan prescribed by the Constitution); Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 306-07 (1990) (allowing for other textual evidence of consent to suit in federal courts to resolve ambiguities that arise in the interpretation of interstate compacts); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 278-79 (1959) (stating that when interpreting waiver from interstate compacts, federal courts are "called on to interpret not unilateral state action but the terms of a consensual agreement, the meaning of which, because made by different States acting under the Constitution and with congressional approval, is a question of federal law"). The most analogous case involving interstate compacts would have to be *Feeney*. *See* text accompanying notes 202-213.

195. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985).

196. *See* Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 896-97 (8th Cir. 2000) (considering both the Compact's consent to suit and venue clauses when determining whether Nebraska had waived its Eleventh Amendment sovereign immunity); *see also Feeney*, 495 U.S. at 306-07 (allowing for other textual evidence of consent to suit in federal courts to resolve ambiguities that arise in the interpretation of interstate compacts).

197. *See* Edelman v. Jordan, 415 U.S. 651, 673 (1974).

198. Nebraska presented the Eighth Circuit essentially the same question that *Feeney* presented the Supreme Court. That is, asking the court to choose between giving the Compact's venue provision its natural meaning and giving the provision no meaning at all. *See* Nebraska v. Centr. Interstate Low-Level Radioactive Waste Comm'n., 187 F.3d 982, 986-87 (8th Cir. 1999); *Feeney*, 495 U.S. at 308.

199. State courts would not be a reasonable venue because of their inherent bias. *See supra* note 220.

200. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

201. The Eleventh Amendment has taken sharp criticism for restricting rights in favor of the states' sovereignty. Justice Stevens has noted that "expansive Elev-

The Eighth Circuit interpreted the Compact's language in a manner consistent with precedent. The most analogous case involving interpretation of an interstate compact's language for waiver of sovereign immunity purposes came in *Port Authority Trans-Hudson Corp. v. Feeney*.[202] In *Feeney*, an employee of a railroad owned by the Port Authority of New York and New Jersey brought an action against the railroad pursuant to the Federal Employers' Liability Act and other related federal statutes. The Port Authority, an entity created by a bi-state compact between New York and New Jersey,[203] claimed Eleventh Amendment immunity against Feeney's suit.

The Court looked principally to the Port Authority's statutory consent to suit provisions enacted by New Jersey and New York for determination of whether the states had waived the Port Authority's immunity from suit.[204] The consent to suit provision provided that New York and New Jersey "consent to suits, actions, or proceedings of any form or nature at law, in equity or otherwise . . . against the Port of New York Authority."[205] The Court, sensitive to the state sovereignty values underlying the Eleventh Amendment, noted that the consent to suit provision standing alone would be insufficient to waive Eleventh Amendment immunity, as the provision was ambiguous to the extent it was not clear whether the provision encompassed suit in only state court or whether the provision included both state and federal court.[206]

In order to resolve the consent to suit provision's ambiguity, the Court sought other textual evidence within the compact. Relying

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enth Amendment jurisprudence is not merely misguided as a matter of constitutional law; it is also an engine of injustice," as it precludes individuals from a judicial forum to enforce their rights against states. *See Hess*, 513 U.S. at 54 (Stevens, J., concurring).

202. 495 U.S. 299 (1990). Though *Feeney* was decided nine years before *College Savings Bank*, *College Savings Bank* has little effect on the underlying *Feeney* reasoning because the majority explicitly distinguished those cases involving interstate Compacts. The Court stated that sovereign immunity cases involving interstate Compacts are "fundamentally different" from cases involving Congress's use of its Article I powers to extract constructive waivers of states' sovereign immunity. The Court noted that Congress's granting of consent to interstate compacts is merely a gratuity and is not comparable to an affirmative exercise of Congressional power. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999).

203. The fact that the Port Authority was not a state was irrelevant to the Court's waiver analysis as the Court assumed arguendo that the suit against the Port Authority was one against the individual states of New York and New Jersey. *See Feeney*, 495 U.S. at 304-05 (citing Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959)).

204. *See Feeney*, 495 U.S. at 306-07.

205. *See* N.J. STAT. ANN. § 32:1-157 (West 1963); N.Y. UNCONSOL. LAWS § 7101 (McKinney 1979).

206. *See Feeney*, 495 U.S. at 306.

upon other provisions found within the Port Authority compact, specifically the compact's venue provision, the Court held that the consent to suit provision extended to suit in federal court.[207] The Court relied upon the venue provision which provided that "[t]he foregoing consent is granted on the condition that venue . . . shall be laid within a country or judicial district, established by one of the said States or by the United States, and situated wholly or partially within the Port of New York District."[208] Thus, the Court, when taking into account *both* the consent to suit and venue provisions, determined that New York and New Jersey had waived the Port Authority's immunity to suit in federal district court.

The *Feeney* decision supports the Eighth Circuit's finding that Nebraska waived its Eleventh Amendment sovereign immunity in two respects. First, *Feeney* reaffirmed the proposition that federal courts can determine whether states waived their sovereign immunity through compact provisions.[209] Secondly, *Feeney* established precedent for the Eighth Circuit to consider other textual evidence of consent to suit in federal courts within the Compact in order to determine if Nebraska waived its immunity. Thus, *Feeney* is a key case to look at in terms of guidance on whether the Eighth Circuit's waiver analysis was correct in *Entergy Arkansas, Inc. v. Nebraska.*

Upon close examination, the differences between the venue and consent provisions in the Port Authority compact in *Feeney* and Nebraska's Compact are insignificant. The Port Authority compact provided that "venue . . . shall be laid within a . . . *judicial district*, established by . . . *the United States.*"[210] The Port Authority compact venue provision, by referring to judicial districts established by the United States, clearly encompassed federal district courts. In Nebraska's Compact, the venue provision similarly includes federal district court. Although perhaps not as explicitly as *Feeney*, Article IV(e) of the Compact provides that "[t]he Commission may initiate any proceedings . . . before any court of law . . . that has jurisdiction over any matter arising under or relating to the terms of the provisions of this compact" and this certainly includes federal district courts. The Compact's venue provision encompasses lower federal courts because, as was indicated earlier, interpretation of interstate compact language

207. *See Feeney*, 495 U.S. at 307.

208. *See* N.J. STAT. ANN. § 32:1-157 (West 1963); N.Y. UNCONSOL. LAWS § 7101 (McKinney 1979).

209. Although a prior case, *Petty*, had determined that a state can waive its immunity from suit through an interstate compact, the majority was not clear on whether the compact provisions were to be interpreted as federal law. *See* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959). *Feeney* made it clear that interstate compacts were indeed federal law and thus provided lower federal courts federal question jurisdiction. *See Feeney*, 495 U.S. at 299.

210. *Feeney*, 495 U.S. at 299 (emphasis added).

presents a federal question[211] by which federal courts can exercise subject matter jurisdiction.[212] Thus, federal district courts must be included within the Compact's designation of "any court of law . . . that has jurisdiction over any matter arising under or relating to the terms of the provisions of this compact," since matters arising under the terms and provisions of the Compact are federal questions.

Unquestionably, the Compact's consent to suit and venue provisions could have been drafted more explicitly. However, complete explicitness is not required for a court to find a waiver of sovereign immunity. *Edelman* made it clear that courts were entitled to interpret waiver when the overwhelming implication of the text leaves no other room for any other reasonable construction but waiver.[213] Consequently, even though the Compact does not precisely articulate consent to suit in the United States district courts, the only reasonable construction of the consent to suit and venue provisions, when read together, is that the party states consented to Commission suits in federal court.

Nebraska, of course, did not interpret the venue provision as providing for lower federal court jurisdiction over disputes involving party states. Nebraska pointed out that the word "federal" was not used to modify the phrase "any court of law," whereas it was used in the same provision to modify "agency, board or Commission."[214] Additionally, Nebraska noted that other Compact provisions intended to refer to lower federal courts do so explicitly. For example, Article IV(l) provides that "[a]ny person or party state aggrieved by a final decision of the Commission may obtain judicial review of such decisions in the *United States District Court* in the District wherein the Commission maintains its headquarters."[215] Thus, Nebraska contended that the Eighth Circuit should have deduced that the omission of a "federal" or a "United States District Court" modifier from the venue and consent to suit clauses in question was indicative of the party states' intent *not* to waive their immunity to suit in the lower federal courts. In making this argument Nebraska cited the canon of statutory construction

211. *See* Cuyler v. Adams, 449 U.S. 433, 438-42 (1981) (holding that the Interstate Agreement on Detainers is a congressionally sanctioned interstate compact, the interpretation of which presents a question of federal law).

212. *See* State *ex rel.* Nelson v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 834 F. Supp. 1205, 1210 (D. Neb. 1993) (asserting that federal courts have federal-question jurisdiction over interpretation of interstate compacts under 28 U.S.C. § 1331).

213. See Edelman v. Jordan, 415 U.S. 651, 673 (1974).

214. Compact, art. IV(e)

215. Compact, art. IV(1) (emphasis added).

whereby disparate inclusion and exclusion of language is presumed to be intentional and purposeful.[216]

Although the canon of statutory construction cited by Nebraska is an oft-used method to decipher statutory language, its application to the Compact's consent to suit and venue provisions would render those provisions virtually meaningless.[217] If the Commission is to require the party states to perform their duties and obligations arising under the Compact in any court of law that has jurisdiction, and according to Nebraska, the lower federal courts are not encompassed by "any court of law," then in what judicial forum is the Commission permitted to appear?

The Supreme Court has determined that similarly created interstate compact commissions are not entitled to invoke the Court's original jurisdiction in disputes against party states.[218] Thus, the only other alternative judicial forum to settle disputes under Nebraska's proposed construction of the Compact would be in state court.[219]

If we were to employ Nebraska's proposed construction of the Compact whereby state courts would be the only eligible judicial forum to hear disputes between the Commission and party states, then the question becomes: in what state court would such disputes be heard? Nebraska would be assuredly surprised to learn that by entering the Compact it was consenting to suit from the Commission within the state courts of the other party states. Likewise, the four other party states would probably be equally surprised to learn that the Compact's venue provision for its judicial enforcement mechanism was only applicable in the forum of the state whose compliance was sought by the action. It is simply inconceivable that the party states intended that disputes between the Commission and a party state arising under the terms and provisions of the Compact would be settled in a

216. *See* Petition for a Writ of Certiorari at 20-21, Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001), *cert. denied sub nom.* Nebraska v. Centr. Interstate Low-Level Radioactive Waste Comm'n, 122 S. Ct. 203 (2001) (mem.) (No. 01-87).

217. Meaningless interpretations of statutory language are to be avoided. *See, e.g.*, Windsor on the River Assoc. v. Balcor Real Estate Fin., Inc., 7 F.3d 127, 130 (8th Cir. 1993).

218. *See* Southeast Interstate Low-Level Radioactive Waste Mgmt. Comm'n v. North Carolina, 121 S. Ct. 2545 (2001) (mem.) (denying an interstate compact commission permission to invoke the Supreme Court's original jurisdiction).

219. However, it is unlikely that a consent to suit in other states' courts provision is even necessary for other party states to submit Nebraska to their courts' jurisdiction. In *Nevada v. Hall*, 440 U.S. 410 (1979), the Court held that a suit brought in the courts of one state against another state did not violate constitutional principles of federalism or state comity. However, the Court did also note in *Hall* that some constitutional constraints might be placed on the exercise of jurisdiction over a sister state if the court action posed a "substantial threat to our constitutional system of cooperative federalism." *Id.* at 424 n.24.

forum as inherently biased as the state court of the state whose compliance is sought.[220]

The notion that the courts of a party state are responsible for determining whether Nebraska has complied with the Compact is absurd.[221] However, Nebraska's interpretation of the Compact's judicial venue provision would require such a result in that it would exclude the possibility of a federal judicial forum to hear Commission complaints against non-complying party states. Since it is extraordinarily unlikely that either Nebraska or any other party state intended for the judicial enforcement mechanism to be exclusive to state courts, Nebraska's interpretation of the Compact's venue provision would render the provision meaningless and superfluous. Nebraska, by arguing that the Compact's consent to suit provision does not include the lower federal courts, essentially asked the Eighth Circuit to make the same choice that *Feeney* posed to the Supreme Court roughly ten years ago; either give the judicial venue provision its natural meaning or give the provision no meaning at all.[222] And as was the case for the Supreme Court in *Feeney*, this choice was not a difficult one to make, as the Eighth Circuit appropriately decided to give the judicial venue provision its natural meaning.

It should be noted that Nebraska did not contend that the Compact has no enforcement mechanism.[223] Nebraska argued that Compact's enforcement mechanism against non-complying party states is pro-

220. For authority documenting the inherent bias of state courts and perceptions thereof, see Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93 (1980); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 407-32 (1992); *see generally* THE FEDERALIST No. 80, at 536-37 (Alexander Hamilton) (Jacob E. Looke ed. 1961).

221. It is absurd for two reasons. First, the idea that a party state's state court system would be an impartial arbiter for disputes arising under the Compact is ridiculous. It is simply not in the realm of comprehensibility that the states would take such care as to enter into an artfully drafted Compact and leave it to any party state's courts to interpret its meaning. Given the consent to suit and venue provisions, a federal forum appears to have been the obvious intent of the party states to settle disputes. The federal courts provide the states an impartial judicial forum that would have the authority of the supreme federal government behind it. Secondly, a consent to suit provision within the Compact for suit in states courts would be superfluous as such consent is not required by the Constitution. *See Hall*, 440 U.S. at 410 (holding that a suit brought in the courts of one state against another state did not violate constitutional principles of federalism or state comity).

222. *See* Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 308 (1990) (stating that the "Petitioner essentially presents the choice between giving the venue provision its natural meaning and giving the provision no meaning at all. Charged with giving effect to the statute, we do not find the choice to be a difficult one.").

223. *See* Brief for Appellant at 32-33, Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001) (No. 99-4263).

vided within two other provisions. One of these provisions empowers the Commission, upon two-thirds vote, to revoke the membership of any party that is found to have arbitrarily or capriciously denied or delayed the issuance of a disposal license.[224] The other provision allows the Commission, after notice and hearing, to suspend the privileges or alternatively revoke the membership of any party state that fails to comply with the terms of the Compact.[225] Nebraska maintained that these suspension and revocation provisions provide the Commission its *exclusive* enforcement mechanism against non-complying party states.[226]

Although Nebraska was correct in that the Commission does have the authority to revoke the membership or suspend the privileges of non-complying party states, there is no indication within the Compact that these enforcement mechanisms are exclusive.[227] Additionally, by interpreting the aforementioned provisions as providing the Commission with the exclusive enforcement mechanism against non-complying states, Nebraska is again impliedly asserting that the consent to suit and venue provisions are meaningless. After all, if the above provisions are the Commission's exclusive enforcement mechanism against party states, what possible meaning could be ascribed the venue and consent to suit provisions?

E. *Entergy Arkansas, Inc. v. Nebraska* in the Context of the Federalism Renaissance

There is no question that the United States Supreme Court has undertaken a pro-states federalism renaissance over the past decade. Numerous commentators have remarked on this renaissance.[228] In a broad context, decisions like *Printz v. United States*[229] and *United States v. Lopez*[230] have reigned in Congressional authority and delineated the states' right to be free from pervasive federal government reg-

224. *See* Compact, art. V(g).

225. *See* Compact, art. VII(e).

226. *See* Brief for Appellant at 32-33, Entergy Ark., Inc. v. Nebraska, 241 F.3d 979 (8th Cir. 2001) (No. 99-4263).

227. *See generally* Compact arts. I to IX.

228. See *Thomas W. Merrill, A New Age of Federalism?*, 1 GREEN BAG 2D 153 (1998); Robert F. Nagel, *Federalism's Slight Revival*, 1993 PUB. INT. L. REV. 25; Bill Swinford & Eric N. Waltenburg, *The Supreme Court and the States: Do* Lopez *and* Printz *Represent a Broader Pro-State Movement?*, 14 J.L. & POL. 319 (1998).

229. 521 U.S. 898 (1997) (finding the Brady Handgun Violence Prevention Act unconstitutional insofar as it required state law enforcement officers perform background checks because Congress cannot compel state executive officials to implement a federal regulatory schema).

230. 514 U.S. 549 (1995) (declaring the Gun-Free School Zones Act unconstitutional because Congress surpassed its commerce power by regulating gun possession, which does not substantially affect interstate commerce).

ulation.[231] In the more specific context of states' Eleventh Amendment sovereign immunity, *Seminole Tribe*,[232] *College Savings Bank*,[233] and *Alden v. Maine*[234] have all marked a significant fortification of the right of sovereign immunity among the states.[235] These recent decisions strengthening states' rights in the federal system mark a significant departure from the nationalism trend that dominated the judicial and political landscape during most of the twentieth century.[236] Moreover, this ideological shift in favor of states' rights is not limited to the Supreme Court, but is part of a larger federalism renaissance extending to the legislative arena as well.[237]

Although the subjection of Nebraska to lower federal court jurisdiction in regard to the Commission's claims may be contrary to general states' rights principles, the Eighth Circuit's rationale for reaching this determination was not. The Eighth Circuit recognized that the federal judiciary should apply a presumption of non-waiver in cases of a state's disputed waiver of sovereign immunity.[238] The Eighth Circuit was only willing to find waiver if the Compact contained a "clear declaration" of Nebraska's intent to submit to suit in federal court, or if an "overwhelming implication from the [Compact's] text [will] leave no room for any other reasonable construction."[239] Consequently, the Eighth Circuit was solicitous toward Nebraska's right to sovereign im-

231. Although one could argue that the federalism renaissance has more to do with curtailing Congressional power than expanding states rights, it is important to realize that the states' rights and Congressional power are often mutually exclusive. For example, when Congress regulates within states under the Commerce Clause, it is in essence usurping state power.

232. 517 U.S. 44, 76 (1996) (declaring that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction").

233. 119 S. Ct. 2219, 2224-25 (1999) (rejecting the lower standard of implied or constructive waiver for inferring states' waiver of Eleventh Amendment sovereign immunity).

234. 119 S. Ct. 2240 (1999) (finding that states have the substantive right of sovereign immunity in their own courts from suits brought by individuals under federal law).

235. Although these cases concern Congress's power to abrogate sovereign immunity as opposed to states' waiver of sovereign immunity, they are nonetheless instructive on the Court's unwillingness to infringe upon state sovereignty and immunity.

236. *See generally* Jeffery G. Homrig, Alden v. Maine*: A New Genre of Federalism Shifts the Balance of Power*, 89 CAL. L. REV. 183 (2001).

237. *See* Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified in various sections of 2 U.S.C.) (attempting to restrict the imposition of unfounded regulatory regimes on the federal government); *see also* DAVID B. WALKER, THE REBIRTH OF FEDERALISM 18 (1995) (commenting on Congress's movement away from the use of categorical grants which restrict states' freedom to choose how to spend public funds).

238. *See* Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 896-97 (8th Cir. 2000).

239. Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 987 (8th Cir. 2001) (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974)).

munity, and in no way was attempting to undermine the federalism renaissance by unjustifiably subjecting Nebraska to federal court jurisdiction. Rather, the Eighth Circuit gave effect to the Compact's consent to suit and venue provisions which overwhelmingly implicate the party states, including Nebraska, to federal suits from the Commission.

F. Retroactivity and Money Damages

The Commission, as noted earlier,[240] has sought damages, an accounting, declaratory relief, removal of Nebraskan officials from the waste disposal licensing process, and the appointment of an impartial third party to complete the licensing process. These potential remedies present a number of undesirable potential outcomes for Nebraska in this litigation. Most relevant for the citizens of and around Boyd County is the possibility that the radioactive waste disposal facility that they have vehemently opposed for so long[241] will soon be constructed. Even under the restrictive remedial doctrine of *Ex parte Young*, there is no question that the district court could grant the Commission's prayer that the licensing review process be completed by an impartial third party, as such relief would be prospective. The more intriguing, and perhaps more relevant question for Nebraska citizens as a whole, is whether the district court would have the authority to grant the Commission's claims for damages. As noted earlier, the resulting damages from the Commission's suit may well exceed $160 million.[242] Such a large damages award would be financially devastating even in the best of fiscal times, however it would be especially difficult for Nebraska's treasury to absorb during an economic downturn when the state's tax revenues have consistently fallen short of state expenditures.[243]

The Eighth Circuit has already stated that should the Commission prevail with its claims, Nebraska may be held liable for damages.[244]

240. *See supra* text accompanying notes 57-58.

241. The residents of Boyd County, Nebraska have been vocal opponents of the proposed waste disposal facility site ever since the site selection has been announced. A local, Boyd County group (Boyd County Local Monitoring Committee) has even been formed by state statute to monitor and represent Boyd County's interests in the application process. This group's aggressive "monitoring" effort has even led to litigation, as at one point it and Boyd County filed suit against US Ecology. *See* County of Boyd v. US Ecology, Inc., 858 F. Supp. 960 (D. Neb. 1994) (holding that Boyd County's fraud claim against USE was barred by res judicata because of earlier suits initiated by Governor Nelson and Nebraska), *aff'd*, 48 F.3d 359 (8th Cir. 1995)

242. *See* O'Hanlon, *supra* note 26, at 2.

243. *See supra* note 27.

244. Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 987 (8th Cir. 2001) (stating that "[w]e carefully considered the Eleventh Amendment issue before deciding it in the course of the preliminary injunction appeal, and our holding that Nebraska

The Eighth Circuit presumably based its declaration that Nebraska could be held liable for damages on the fact that the Commission seeks relief under the waiver doctrine as opposed to the narrower *Ex parte Young* exception. While the Eighth Circuit's finding that Nebraska could be held liable to the Commission for damages would only have practical significance if the Commission were to prevail on its claims, the Eighth Circuit's declaration is nonetheless deserving of analysis.

Preventing the award of money judgments against states is one of the traditional core protections of the Eleventh Amendment.[245] The exposure of a state's treasury has been identified as the "critical factor" in cases where a state's Eleventh Amendment immunity is in dispute.[246] Indeed, it was the states' treasuries that the Eleventh Amendment specifically sought to protect.[247] Consequently courts have historically been reluctant to expose state treasuries to damage awards.[248]

Despite courts' concern for the sanctity of state treasuries, damages have been awarded against states in federal court[249] and specifically in cases involving interstate compacts.[250] In *Texas v. New Mexico*,[251] the U.S. Supreme Court concluded that even though Texas and New Mexico's interstate water-sharing compact lacked a specific provision for a remedy in the case of breach, New Mexico was entitled to money damages from Texas for Texas' breach of the compact. Although the Court recognized that there may be difficulties in enforcing judgments against the states, it did not believe that such potential

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waived its immunity from claims by the Commission, including claims for damages, is now the law of the case." (citation omitted)).

245. *See* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 STAN. L. REV. 1033, 1129 (1983).

246. *See* Feeney v. Port Auth. Trans-Hudson Corp., 873 F.2d 628, 631 (1989), *aff'd on other grounds*, 495 U.S. 299 (1990).

247. *See* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 39 (1994) (stating that "[a]doption of the [Eleventh] Amendment responded most immediately to the States' fears that 'federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin'" (quoting Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 151 (1984) (Stevens, J., dissenting))).

248. *See id.* at 48 (noting that protection of state treasuries is the most salient factor in Eleventh Amendment immunity analysis); Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 732-33 (7th Cir. 1994) (stating that the most significant factor is whether an entity has the power to raise its own funds); Hutsell v. Sayre, 5 F.3d 996, 999 (6th Cir. 1993) (stating that "[t]he most important factor . . . is whether any monetary judgment would be paid out of the state treasury").

249. *See, e.g.*, Kansas v. Colorado, 533 U.S. 1 (2001) (holding that a Special Master's award of damages against Colorado for the violation of an interstate compact does not violate the Eleventh Amendment).

250. *See* Texas v. New Mexico, 482 U.S. 124, 129-131 (1987).

251. 482 U.S. 124 (1987).

difficulties undermined the federal courts' authority to enter judgments for damages against the states.[252]

Texas v. New Mexico established the federal courts' authority to award money damages against a state for breach of an interstate compact even though the compact did not specifically provide for such an award. However, *Texas v. New Mexico* is not directly analogous to the Commission and Nebraska's dispute because *Texas v. New Mexico* was an original action before the Supreme Court. Nonetheless, the underlying principal articulated in *Texas v. New Mexico* that damages can be awarded against a state even though that state did not specifically consent within its compact to such a remedy is applicable to the Commission's suit, as the Compact has no relevant remedy provision. In fact, the Eighth Circuit relied upon the language within *Texas v. New Mexico* when it found that Nebraska could be held liable for money damages should the district court find that Nebraska breached the Compact. The Eighth Circuit noted that "[t]here is nothing in the nature of [interstate] compacts generally . . . that counsels against rectifying a failure to perform in the past as well as ordering future performance called for by the Compact."[253] Thus, the Eighth Circuit concluded that Nebraska's waiver to suit from the Commission vis-à-vis its assent to the Compact was broad enough to encompass suits for damages.

G. Repercussions of the Eighth Circuit's Decision

The Eighth Circuit's conclusion that Nebraska can be held liable for damages could have enormous ramifications for the state's budget should the Commission prevail in its claim for damages. The total tally for Nebraska, including interest and attorneys' fees, could reach an estimated $160 million.[254] Such an outcome would be crippling to the state's budget and leads one to wonder whether the state would comply with such an award. The prospect of a state refusing to pay a federal court's damages award could be enough for the U.S. Supreme Court to hear an assured appeal from Nebraska where it could reconsider the imposition of damages on Nebraska. However, until the district court hears the case, any conjectures about the consequences of a potential damages award are speculative and premature.

IV. CONCLUSION

The licensing process for the low-level radioactive waste disposal facility has been ensnarled in controversy from the start. And unfor-

252. *See id.* at 131.
253. *See* Entergy Arkansas, Inc. v. Nebraska, 241 F.3d 979, 988 (8th Cir. 2001) (quoting Texas v. New Mexico, 482 U.S. 124, 128 (1987)).
254. Assuming of course the Commission is able to link all of its claimed damages to Nebraska's bad faith. *See* O'Hanlon, *supra* note 26, at 2.

tunately for Nebraskans, it does not look like it will have a happy ending, as the Eighth Circuit's determination that Nebraska waived its sovereign immunity to federal suits from the Commission by entering the Compact has exposed Nebraska to an extraordinary liability.

However unpleasant the Eighth Circuit's decision in *Entergy Arkansas, Inc. v. Nebraska* is for Nebraskans, the finding of waiver of sovereign immunity is consistent with Supreme Court precedent. The Supreme Court addressed the issue of deriving a state's waiver of sovereign immunity from the language contained within an interstate compact in *Feeney*. In *Feeney*, the Court held that a compact's consent to suit and venue provisions, when read together, left no other reasonable interpretation besides waiver of immunity to suit in federal court. The Compact's consent to suit and venue provisions dictated that the Eighth Circuit reach a similar conclusion in *Entergy Arkansas, Inc. v. Nebraska*. Compacts present federal questions that bestow jurisdiction upon the lower federal courts pursuant 28 U.S.C. § 1331. Consequently, Nebraska's assent to language permitting the Commission to bring an action against the party states in "any court of law . . . that has jurisdiction" represents a definitive waiver of sovereign immunity in that it leaves no room for any other reasonable construction other than waiver to suit from the Commission in federal court.

Nebraska's proposed interpretation of the Compact's consent to suit and venue provisions would render those provisions essentially meaningless and superfluous, as according to Nebraska, they would not provide the Commission any judicial enforcement mechanism against non-complying party states. Thus, Nebraska's interpretation of the Compact would thwart the central aim of the Compact's consent to suit and venue provisions, which was to provide an independent judicial forum to entertain disputes between the Commission and the party states that arise under the Compact.

The Eighth Circuit properly rejected Nebraska's interpretation of the Compact in *Entergy Arkansas, Inc. v. Nebraska*, and accordingly gave effect to each word and clause within the Compact. The Eighth Circuit did not disrupt the fundamental balance of federalism or apply a sub-constitutional standard for interpreting a state's waiver of sovereign immunity. A state is entitled to waive its Eleventh Amendment sovereign immunity at its pleasure and that is exactly what Nebraska did when it assented to the Compact's consent to suit and venue provisions. Consequently, Nebraska must now defend against, and possibly answer for in the form of money damages, the Commission's claims that it allegedly acted in bad faith during the licensing application review process for the Boyd County waste disposal facility.

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